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Jiwaneswary a/p Raman v Etiqa General Takaful Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-04(IM)-443–09 OF 2021
VAZEER ALAM, RAVINTHRAN AND NORDIN HASSAN JJCA
25 JANUARY 2023

C *Insurance — Motor insurance — Liability — Whether insurer of vehicle allegedly involved in road accident had right to intervene in proceedings to determine liability for accident — Whether intervention should be allowed because s 96(1) of the Road Transport Act 1987 ('the RTA') required insurer to satisfy any judgment against its insured — Whether justice and fairness required* D *insurer to be given opportunity to be heard in proceedings to determine liability — Whether such right of intervention was unaffected by insurer's separate right to apply under s 96(3) of the RTA to declare insurance policy void and unenforceable*

The appellant had filed a suit in the magistrate's court against the driver and the E owner of a car for colliding into her rear while she was riding a motorcycle. Before trial of the suit commenced, the respondent insurer of the car applied to intervene and be added as a party to the proceedings pursuant to O 15 r 6 of the Rules of Court 2012 ('the ROC'). In its intervention application, the respondent claimed that its investigations revealed that its insured car and F driver were not involved in the alleged accident and it was necessary that the respondent was allowed to intervene in the proceedings to protect its interests and to enable all matters in dispute to be fully and effectively determined by the court. The magistrate dismissed the application on the ground that the insurer's liability under s 96(1) of the Road Transport Act 1987 ('the RTA') only G arose if any judgment was entered against its insured, hence the respondent would not be prejudiced if the application was disallowed. The magistrate held that the respondent had not shown any evidence that the appellant's claim in the suit was fraudulent and neither had the respondent explained why it took six months to make the intervention application. On appeal, the High Court H overturned the magistrate's decision and allowed the intervention application. In the instant appeal against that decision, the appellant argued that: (a) the respondent had no interest or locus standi to intervene in the proceedings since it was only to determine whether or not its insured was liable for the accident; (b) any contention by the respondent that it was not liable to satisfy any I judgment entered against its insured had to be determined in a separate proceeding pursuant to s 96(3) of the RTA; (c) the affidavit in support of the intervention application did not disclose any element of fraud; and (d) the appellant could not be compelled to make the respondent a party to her action against her wish. In reply, the respondent submitted that it had fulfilled the test

for intervention by showing that it had a bona fide interest in the proceedings as any judgment entered against the insured would not only adversely affect its legal rights but also its pocket.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) **(per Vazeer Alam JCA, supporting)** Despite the availability of the statutory remedy under s 96(3) of the RTA to avoid liability, the respondent still had the right to intervene in the magistrate's court proceedings. The respondent had based its intervener application, inter alia, on the ground that the insured vehicle was not involved in any collision with the appellant's vehicle. In other words, the respondent was alleging collusion between the appellant and the alleged tortfeasor to defraud the respondent. The respondent intended, after intervention, to cross-examine the witnesses and call their own witnesses to put forth its case of collusion so that all available evidence was before the magistrate when the final decision was made on liability (see paras 4 & 6–7).

(2) **(per Vazeer Alam JCA, supporting)** Even if the respondent applied for a declaration under s 96(3) of the RTA after its intervention application was allowed, an application could be made for the s 96(3) proceedings to be heard and disposed of by the same court that was hearing the tortious claim. This would be consonant with the pronouncements made in *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303 and *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 to the effect that ideally the determination of tortious liability between the parties in the tort claim and the application for declaration under s 96(3) ought to be heard and determined by the same court to avoid multiplicity of suits (see paras 10–11).

(3) **(per Nordin Hassan JCA)** The respondent had satisfied the requirements under O 15 r 6 of the ROC and the test to intervene in the proceedings. As the insurer, the respondent was liable under s 96(1) of the RTA to satisfy any judgment against the insured owner of the car. A flexible approach needed to be adopted to prevent any injustice to the respondent. The respondent had to be given the right to be heard and this would also allow the matter in dispute before the magistrate to be effectively and completely determined. It was immaterial that the respondent's liability under s 96(1) was only contingent upon a judgment being entered against the insured. What was important was that there was an issue between the appellant and the respondent which was connected with the relief or remedy claimed in the suit (see paras 32–33).

(4) **(per Nordin Hassan JCA)** Although an insurer might obtain a declaration from the High Court under s 96(3) of the RTA that the insurance policy was void and unenforceable on the ground, inter alia,

that the insured was not involved in the accident, this did not mean that the insurer was absolved from liability under s 96(1) in the event the trial judge decided on liability against the insured. This gave more reason to allow the insurer to intervene at the trial stage to protect its interest. Allowing the intervention would avoid duplicity of proceedings (see paras 39 & 44).

(5) **(per Nordin Hassan JCA)** The Federal Court's recent decision in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825 ('AmGeneral Insurance') indicated that the insurance company needed to be involved in the trial that determined the liability of its insured to protect its interest. It would be too late and risky for the insurance company if it relied on s 96(3) to obtain a declaration that the insurance policy was void and unenforceable especially on the basis that their insured was not involved in the accident, as in the present case. Furthermore, the Federal Court decided that the issue of negligence or involvement in an accident was an issue of tort which needed to be determined by viva voce evidence in a single trial and not by two different or separate proceedings. Thus, the cases of *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303 and *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 relied upon by the appellant on the related issue was no longer good law (see paras 41 & 45).

(6) **(per Nordin Hassan JCA)** The respondent had explained that the delay in the filing of the intervener application was because it needed time to conduct investigations to ascertain whether the insured was actually involved in the accident (see para 46).

(7) **(per Nordin Hassan JCA)** In an application under O 15 r 6 of the ROC, the argument that the plaintiff did not wish to make the intended intervener one of the defendants in its suit did not arise. Order 15 r 6 gave the court wide discretion to allow an intervener application to ensure that the dispute would be effectually and completely determined and adjudicated upon (see para 47).

[Bahasa Malaysia summary

Perayu telah memfailkan saman di mahkamah majistret terhadap pemandu dan pemilik kereta kerana melanggar di belakangnya semasa dia menunggang motosikal. Sebelum perbicaraan saman itu bermula, syarikat insurans responden kereta itu memohon untuk mencelah dan ditambah sebagai pihak dalam prosiding menurut A 15 k 6 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Dalam permohonan mencelah itu, responden mendakwa bahawa siasatannya menunjukkan bahawa kereta dan pemandu yang diinsuranskan tidak terlibat dalam kemalangan itu dan responden perlu mencelah dalam prosiding itu untuk melindungi kepentingannya dan membolehkan semua

perkara yang dipertikaikan ditentukan sepenuhnya oleh mahkamah. Majistret menolak permohonan itu atas alasan liabiliti syarikat insurans di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('APJ') hanya timbul sekiranya sebarang penghakiman dibuat terhadap pihak yang diinsuranskan, oleh itu responden tidak akan diprejudiskan jika permohonan itu tidak dibenarkan. Majistret memutuskan bahawa responden tidak menunjukkan sebarang bukti bahawa tuntutan perayu dalam saman itu adalah palsu dan kedua-dua responden tidak menjelaskan mengapa mereka mengambil masa enam bulan untuk membuat permohonan mencelah. Ketika mengemukakan rayuan, Mahkamah Tinggi membatalkan keputusan majistret dan membenarkan permohonan mencelah itu. Dalam rayuan ini terhadap keputusan itu, perayu berhujah bahawa: (a) responden tidak mempunyai kepentingan atau locus standi untuk mencelah dalam prosiding itu kerana ianya hanya untuk menentukan sama ada pihak yang diinsuranskan bertanggungjawab terhadap kemalangan itu; (b) sebarang hujahan oleh responden bahawa mereka tidak bertanggungjawab untuk memenuhi sebarang penghakiman yang dibuat terhadap pihak yang diinsuranskan perlu ditentukan dalam prosiding berasingan menurut s 96(3) APJ; (c) afidavit bagi menyokong permohonan mencelah itu tidak mendedahkan sebarang unsur penipuan; dan (d) perayu tidak boleh dipaksa untuk memasukkan responden sebagai pihak dalam tindakannya yang bertentangan dengan kehendaknya. Sebagai balasan, responden menghujahkan bahawa mereka telah memenuhi ujian untuk mencelah dengan menunjukkan bahawa mereka mempunyai kepentingan bona fide dalam prosiding itu kerana sebarang penghakiman yang dibuat terhadap pihak yang diinsuranskan bukan sahaja akan menjejaskan hak undang-undangnya tetapi juga kewangannya.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) **(oleh Vazeer Alam HMR, menyokong)** Walaupun terdapat remedi statutori di bawah s 96(3) APJ untuk mengelakkan liabiliti, responden masih mempunyai hak untuk mencelah dalam prosiding mahkamah majistret. Responden berdasarkan permohonan mencelahnya, antara lain, atas alasan kenderaan yang diinsuranskan tidak terlibat dalam sebarang kemalangan dengan kenderaan perayu. Dalam erti kata lain, responden mendakwa wujud pakatan antara perayu dan pelaku tort yang dikatakan menipu responden. Responden berhasrat, selepas mencelah, untuk memeriksa balas saksi-saksi dan memanggil saksi mereka sendiri untuk mengemukakan kes pakatannya ('collusion') supaya semua keterangan dapat dikemukakan di hadapan majistret apabila untuk dapatan liabiliti (lihat perenggan 4 & 6–7).

(2) **(oleh Vazeer Alam HMR, menyokong)** Walaupun responden memohon perisytiharan di bawah s 96(3) APJ selepas permohonan mencelahnya dibenarkan, permohonan boleh dibuat agar prosiding

s 96(3) didengar dan diputuskan oleh mahkamah yang sama yang sedang mendengar tuntutan tort itu. Ini selaras dengan keputusan di dalam kes *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303 dan *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 yang menyatakan bahawa sebaik-baiknya penentuan liabiliti tort antara pihak-pihak dan permohonan perisytiharan di bawah s 96(3) harus didengar dan ditentukan oleh mahkamah yang sama untuk mengelakkan pertindihan saman (lihat perenggan 10–11).

(3) **(oleh Nordin Hassan HMR)** Responden telah memenuhi syarat-syarat di bawah A 15 k 6 KKM dan ujian untuk mencelah dalam prosiding itu. Sebagai penanggung insurans, responden bertanggungjawab di bawah s 96(1) APJ untuk memenuhi sebarang penghakiman terhadap pemilik kereta yang diinsuranskan. Pendekatan fleksibel perlu diguna pakai untuk mengelakkan sebarang ketidakadilan terhadap responden. Responden perlu diberi hak untuk didengar dan ini juga akan membolehkan perkara yang dipertikaikan di hadapan majistret ditentukan dengan berkesan dan sepenuhnya. Adalah tidak penting bahawa liabiliti responden di bawah s 96(1) hanya bergantung kepada penghakiman yang dimasukkan terhadap pihak yang diinsuranskan. Perkara yang penting adalah terdapat isu antara perayu dan responden yang berkaitan dengan relif atau remedi yang dituntut dalam saman itu (lihat perenggan 32–33).

(4) **(oleh Nordin Hassan HMR)** Walaupun penanggung insurans mungkin memperoleh perisytiharan dari Mahkamah Tinggi di bawah s 96 (3) APJ bahawa polisi insurans itu tidak sah dan tidak boleh dikuatkuasakan atas alasan, antara lain, bahawa pihak yang diinsuranskan tidak terlibat dalam kemalangan itu, ini tidak bermakna bahawa penanggung insurans telah dibebaskan daripada liabiliti di bawah s 96(1) sekiranya hakim perbicaraan memutuskan liabiliti terhadap pihak yang diinsuranskan. Ini memberi lebih banyak alasan untuk membolehkan penanggung insurans mencelah pada peringkat perbicaraan untuk melindungi kepentingannya. Membenarkan permohonan mencelah akan mengelakkan pertindihan prosiding (lihat perenggan 39 & 44).

(5) **(oleh Nordin Hassan HMR)** Keputusan Mahkamah Persekutuan terkini di dalam *AmGeneral Insurance Bhd v Sa'Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825 ('AmGeneral Insurance') menunjukkan bahawa syarikat insurans perlu terlibat dalam perbicaraan yang menentukan liabiliti yang diinsuranskan untuk melindungi kepentingannya. Adalah berisiko bagi syarikat insurans sekiranya bergantung kepada s 96(3) untuk mendapatkan perisytiharan bahawa polisi insurans tidak sah dan tidak boleh dikuatkuasakan terutamanya atas dasar bahawa mereka yang diinsuranskan tidak terlibat dalam kemalangan itu, seperti dalam kes ini. Selain itu, Mahkamah Persekutuan

memutuskan bahawa isu kecuaian atau keterlibatan dalam kemalangan adalah isu tort yang perlu ditentukan di dalam perbicaraan dan bukannya melalui dua prosiding berbeza atau berasingan. Oleh itu, kes *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303 dan *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 yang digunakan oleh perayu mengenai isu berkaitan bukan lagi undang-undang yang baik (lihat perenggan 41 & 45).

(6) **(oleh Nordin Hassan HMR)** Responden telah menjelaskan bahawa kelewatan dalam pemfailan permohonan mencelah itu adalah kerana mereka memerlukan masa untuk menjalankan siasatan untuk memastikan sama ada pihak yang diinsuranskan benar-benar terlibat dalam kemalangan itu (lihat perenggan 46).

(7) **(oleh Nordin Hassan HMR)** Dalam permohonan di bawah A 15 k 6 KKM, hujah bahawa plaintif tidak mahu dijadikan pencelah yang dicadangkan sebagai salah seorang defendan dalam samannya tidak timbul. Aturan 15 k 6 memberi budi bicara luas kepada mahkamah untuk membenarkan permohonan mencelah bagi memastikan pertikaian itu dapat ditentukan dan diadili secara berkesan dan sepenuhnya (lihat perenggan 47).]

Cases referred to

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 8 CLJ 175, FC (refd)

Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis [1991] 2 MLJ 27; [1991] 2 CLJ 862, SC (refd)

Badruzamani bin Azmi v Kurnia Insurance (M) Bhd [2001] 6 MLJ 481, HC (overd)

Chan Yee v Chan Yoke Fong [1990] 3 MLJ 297, SC (refd)

Chu Yuen Wah v Lee Kwok Kee & Anor [1995] 3 HKC 629, CA (refd)

Govinaraju a/l Nagarajan v Pacific & Orient Insurance Co Bhd [2014] 8 MLJ 839; [2014] 1 CLJ 1076, HC (refd)

Gurtner v Circuit [1968] 1 All ER 328, CA (refd)

Johannes Koplan v Aw Chen [1970] 1 MLJ 220b, FC (refd)

Kimile ak Dangea v MSIG Insurance (M) Bhd [2013] 7 MLJ 576, HC (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 4 MLJ 541; [2011] 5 CLJ 866, CA (refd)

Mohamad Zulkarnain bin Mustafa v Allianz General Insurance Company (M) Bhd & Ors [2020] MLJU 1692, FC (refd)

Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu [2021] 1 MLJ 303; [2021] 1 CLJ 523, CA (overd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)

Sri Permata Sdn Bhd v PPH Realty Sdn Bhd (Lingkaran Cemerlang Sdn Bhd, intended intervenors) [2002] 1 MLJ 552, HC (refd)

A *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143, SC (refd)

Legislation referred to

Road Transport Act 1987 s 96, 96(1), (2), (3)
Rules of Court 2012 O 15 r 6, 6(2)(b)(i), (2)(b)(ii)

B

Manoharan a/l Veerasamy (with Rajan Ayyapan) (Mano Veera & Co) for the appellant.
Tom Chin (with Amanina Farhana bt Salim) (Zaid Ibrahim & Co) for the respondent.

C

Vazeer Alam JCA (delivering supporting judgment of the court):

[1] Having read the draft judgment of my learned brother Dato' Nordin Hassan JCA, I agree with the same, and wish to add the following to address the additional issue raised by learned counsel for the appellant in the additional written submissions.

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[2] Learned counsel for the appellant submitted that if the respondent as insurer of third party risk under the policy of insurance issued to the alleged tortfeasor (defendant in the magistrates court) intends to avoid statutory liability under s 96(2) of the RTA, then the remedy is statutorily provided in s 96(3) of the RTA, which is for the respondent to seek a declaration from the court to declare the insurance policy void on grounds of fraud, etc.

E

F

[3] Hence, learned counsel for the appellant submitted that the respondent's application to intervene in the magistrates court proceedings that was adjudicating the appellant's tortious claim was misplaced. In this regard, learned counsel for the appellant urged this court to allow the appeal to set aside the High Court's order and reinstate the decision of the magistrates court dismissing the intervenor application; and further urged this court direct the respondent to file an application for declaration pursuant s 96(3) of the RTA.

G

[4] We are of the view that despite the availability of the statutory remedy under s 96(3) of the RTA to avoid liability, the respondent would still have the right to intervene in the magistrates court proceedings for the reasons that my learned brother Nordin Hassan JCA had stated in his judgment. I wish to add the following reasons as well, primarily as regards the additional issue raised by the appellant.

H

I

[5] In this case, the appellant sued the alleged tortfeasor (who was insured by the respondent) in the magistrates court for negligence and claimed damages resulting from a motor vehicle collision allegedly involving a vehicle driven by the tortfeasor and another vehicle driven by the appellant. In the event the

appellant was successful in establishing her case against the tortfeasor and obtain judgment in the magistrates court, then the respondent, as insurer of the tortfeasor against third party risk, would statutorily be liable to satisfy that judgment pursuant to s 96(2) of the RTA provided the requisite statutory notice had been served by the appellant.

[6] The respondent had sought to intervene in the magistrates court proceedings on grounds that their investigations had allegedly revealed that contrary to the appellant's allegation, the tortfeasor's vehicle was not involved in any collision with the appellant's vehicle. In essence, the respondent was alleging collusion between the appellant and the alleged tortfeasor to defraud the respondent.

[7] The respondent had stated in their affidavit in support of the application to intervene that, they intended to intervene in the magistrates court proceedings to cross examine the witnesses, and call their own witnesses to put their case of collusion to the parties so that all available evidence would be before the magistrates court, when the final decision is made on liability.

[8] However, learned counsel for the appellant argues that if the respondent is allowed to intervene and partake in the magistrates court proceedings; and if the respondent were to also file an application for declaration under s 96(3) of the RTA to avoid liability, then there would be multiplicity of proceedings. For that reason, counsel urged this court to reinstate the magistrates court order disentitling the respondent to intervene and order the respondent to file an application under s 96(3) of the RTA.

[9] We are unable to accept this argument for the following reasons. Firstly, this is a purely hypothetical postulation by learned counsel for the appellant. The respondent had not filed any application for declaration under s 96(3) of the RTA. The magistrates court proceeding was the only proceedings that was on-going, and had not concluded when the application to intervene was made by the respondent. In the circumstance, it would be only proper for the respondent to intervene in the magistrates court action, so that the respondent would be availed of the opportunity to present its factual contention that there was no collision involving the insured's vehicle.

[10] Secondly, even if the respondent were to file an application for declaration under s 96(3) of the RTA, after the order for intervention is made, an application can be made for both the tortious claim and the s 96(3) RTA application be transferred to the sessions court for the purposes of both the matters being heard and disposed of by the same court. This would be consonant with the ruling of this court in *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303; [2021] 1 CLJ 523, and would

be in tandem with the pronouncement of the Federal Court in *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175 to the effect that ideally the determination of tortious liability between the parties in the tort claim and the application for declaration under s 96(3) of the RTA by the insurer to avoid liability ought to be heard and determined by the same court.

[11] Hence, we do not find any merit in the additional issue of possible multiplicity of suits if this appeal was not allowed and the order of the magistrates court is not reinstated.

Nordin Hassan JCA (delivering judgment of the court):

[12] This is an appeal against the decision of the High Court in allowing the respondent, an insurance company, to intervene in a trial of a running down case, under O 15 r 6 of the Rules of Courts 2012. The appellant instituted civil action at Sungai Petani Magistrate Court against the driver and the registered owner of the car bearing registration number PFH 3246. The car was insured by the respondent.

THE BACKGROUND FACTS

[13] Briefly, the appellant/plaintiff filed a civil suit at Sungai Petani Magistrate Court against Prabu a/l Permaloo, the first defendant, and Thayalan a/l Permaloo, the second defendant. In the statement of claim, it was the appellant's pleaded case that on 9 May 2019 at about 8.45am, the appellant was riding a motorcycle registration number KEA 6260 at Jalan Lencong Timur, Sungai Petani when a car bearing registration number PFH 3246 collided into her motorcycle from the rear. The car was driven by the first defendant and the second defendant was the registered owner of the car which was insured by the respondent.

[14] Before the trial at the magistrate court commenced, the respondent applied to intervene in the proceedings pursuant to O 15 r 6 of the Rules of Courts 2012. In the affidavit in support of the application, which was attested by Chung Suet Yeen @ Gladys, the respondent's Head of Division of Motor Insurance Claim, the respondent, inter alia, averred that the first defendant and the car number PFH 3246 were not involved in the alleged accident. The respondent applied to be made a party to the proceedings to ensure that the dispute or matter could be effectively and completely determined by the court.

[15] In the respondent's affidavit in support, in paras 8 and 11, these were averred:

8. Namun demikian, saya menegaskan bahawa siasatan oleh Pemohon mendapati

bahawa *Defendan pertama dan motokar bernombor pendaftaran PFH 3246 sebenarnya tidak terlibat di dalam kemalangan tersebut.*

...

11. Tambahan pula, saya sesungguhnya menyatakan bahawa Pemohon perlu dijadikan satu pihak di dalam tindakan ini supaya pemohon dapat membela tindakan Plaintif dan *semua perkara-perkara yang dipertikaikan oleh Pemohon dapat didengar dan diputuskan oleh Mahkamah Yang Mulia ini secara efektif dan dengan sepenuhnya.* (Emphasis added.)

[16] The respondent's application to intervene was dismissed by the magistrate. Reliance was placed, inter alia, to the decision of the High Court case *Badruzamani bin Azmi v Kurnia Insurance (M) Bhd* [2001] 6 MLJ 481 which dismissed an application by the insurance company to intervene on the ground among others, that the vehicle's insurer's liability under s 96(1) of the Road Transport Act 1987 ('the RTA') is a contingent statutory liability, contingent upon a judgment obtained against the insured. The magistrate also opined that the respondent suffered no prejudice even if not made a party to the proceedings. Further, the magistrate found that there was no evidence of fraud to allow the respondent intervention. In addition, the magistrate was of the view that the delay of six months to file the application to intervene was not explained by the respondent.

[17] However, upon appeal by the respondent, the High Court overturned the decision of the magistrate court and allowed the respondent to intervene in the trial before the magistrate court. Applying the test to intervene in cases such as *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27; [1991] 2 CLJ 862, and *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220b, the High Court judge was of the view that the application to intervene should be allowed. The High Court judge was also of the view that she was not bound by the decision in *Badruzamani*'s case as although the case was affirmed by the Court of Appeal no grounds of judgment was written by the court.

THE APPEAL

[18] In the appeal before us, the appellant submitted firstly, that the respondent has no locus standi to intervene in the proceedings as the respondent's liability under s 96(1) of the RTA is contingent upon a judgment obtained by the appellant at the magistrate court. Thus, until such time, the respondent has no interest or locus to intervene in the proceedings.

[19] It was further contended that the dispute on liability to pay the third party based on the insurance policy should only be made at the stage where a declaration is sought under s 96(3) of the RTA that the insurance was void and

unenforceable. This dispute must be adjudicated in a separate proceeding. The Court of Appeal case of *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu* [2021] 1 MLJ 303; [2021] 1 CLJ 523 was relied upon by the appellant.

[20] Counsel for the appellant also submitted that the affidavit evidence supporting the application to intervene failed to disclose any element of fraud. As such, the application is without any merit and based on bare assertion.

[21] Lastly, the appellant contended that the appellant cannot be forced to make the respondent one of the defendants in the trial which the appellant does not wish to do so. The case of *Tajjul Ariffin bin Mustafa v Heng Cheng Hong* [1993] 2 MLJ 143 was cited in support of this contention.

[22] In opposing the appeal by the appellant, counsel for the respondent essentially submitted that the respondent would be directly affected by any judgment against the insured in this case under s 96(1) of the RTA. This fulfills the test to intervene in the Sungai Petani Magistrate Court trial. The case of *Sri Permata Sdn Bhd v PPH Realty Sdn Bhd (Lingkaran Cemerlang Sdn Bhd, intended intervenors)* [2002] 1 MLJ 552 and *Pegang Mining*'s case were cited to support the submission.

[23] It was further contended that proving fraud is not an element to succeed in an application to intervene. What is pertinent is to show the court that the applicant would be affected by the decision of the court, and the application was made the soonest possible and without mala fide. In addition, the applicant in this case suffers no prejudice which cannot be compensated with costs when the application to intervene is allowed.

THE ANALYSIS AND DECISION OF THIS COURT

[24] To begin with, the respondent's application to intervene was made pursuant to O 15 r 6(2)(b)(i) and (ii) of the Rules of Courts 2012. For ease of reference said O 15 r 6 is reproduced below:

> 6(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application —*
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) *order any of the following persons to be added as a party*, namely —

(i) any person who ought to have been joined as a party or whose presence before the Court is *necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon*; or

(ii) any person between whom and *any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter* which, in the opinion of the Court, *would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.* (Emphasis added.)

[25] The wording of O 15 r 6 above is plain and clear that the court has the discretion to order any person to be added as a party in a proceeding under O 15 r 6(2)(b)(i), if its presence is necessary to ensure the dispute be effectually and completely determined and adjudicated or under O 15 r 6(2)(b)(ii), if there exists a question or issue arising out of or connected with any relief or remedy claimed.

[26] The application of O 15 r 6 and its test to succeed has been discussed in a plethora of cases and among others is the Supreme Court case of *Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27; [1991] 2 CLJ 862. In this case, it was held as follows:

[1](a) *One of the principal objects of O 15 r 6 of RHC 1980, which replaced O 16 r 11 of Rules of Supreme Court 1967, is to enable the Court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without giving this person an opportunity of being heard.*

[2] As a result of *Gurtner v Circuit, a person who is not a party is allowed to intervene if the intervener is directly affected not only in his legal rights (as provided for under O 15 r 6 RHC 1980) but in his pocket.* (Emphasis added.)

[27] In the same case, this was said by Gunn Chit Tuan SCJ:

One of the class of cases covered by the said rule, which allows intervention by persons, not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v Circuit* [1968] 1 All ER 328, the effect of which is *to include any case in which the intervener is directly affected not only in his legal rights but in his pocket.* In this connection, we would refer to and respectfully adopt the following dictum of Lord Denning MR, in that case, in which His Lordship said as follows:

It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or

A *in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome.* (Emphasis added.)

B

[28] On the same issue, the test laid down in a Privy Council case of *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 for the court to determine whether a person can be added as a party is as explained by Lord Diplock in the following words:

C

The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view, *one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard.* To

D achieve this object calls for a *flexibility of approach* which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.

It has been sometimes said as in *Moser v Marsden* [1892] 1 Ch 487 and in *In re IG*

E *Farbenindustrie AG* [1944] Ch 41 that a party may be added *if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between 'legal' and 'commercial' interests helpful.* A better way of expressing the test is: *will his*

F *rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which ma y be made in the action?* (Emphasis added.)

G **[29]** Having highlighted the application of O 15 r 6, and the test to be adopted, we now revert to the present case. It is undisputed fact that the car bearing registration number PFH 3246 was insured by the respondent. As such, the respondent is statutorily liable for any judgment against the person insured by the insurance policy and in the present case the second defendant.

H This is provided under s 96(1) of the RTA which states as follows:

96(1) If, after a certificate of insurance has been delivered under subsection 91(4) *to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy*, then

I notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, *the insurer shall*, subject to this section, *pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability*, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[30] This court in *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 4 MLJ 541; [2011] 5 CLJ 866 has explained extensively the statutory liability of an insurance company against an insured person under s 96(1) of the RTA, inter alia, as follows:

> [26] *Section 96(1) of the RTA imposes a duty on the part of the insurers to satisfy judgments against persons insured in respect of third-party risks. If the insurers refuse to satisfy the judgments, then the plaintiffs — be it the dependants or injured victims of the tortfeasors' negligence, have a legal right under s 96(1) of the RTA to file a writ against the insurers.*
>
> [27] Section 96(1) of the RTA must be construed literally by looking at the language employed by Parliament and giving it its ordinary and natural sense. This is the literal approach and it has been explained by Higgins J in *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others* [1920] 28 CLR 129, *at pp 161 to 162, in this way:*
>
> > The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable. (Emphasis added.)

[31] Further in a recent Federal Court case of *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175, it was further emphasised that an insurer is bound to settle the judgment sum against the insured and further without the need to have a recovery action by the claimant. Abdul Rahman Sebli FCJ delivering the judgment of the court said this:

> [102] The first appellant had another argument. It was contended that the respondent as the third-party claimant could not apply to set aside the order pursuant to O 35 r 1(2) of the Rules of Court 2012 because he had a specific remedy provided by s 96(1) of the RTA to file for recovery against the insurer. The argument must fail. There is nothing in s 96(1) to say that the third-party claimant must first obtain another judgment against the insurer before he could proceed to enforce the judgment that he had earlier obtained against the insured. After all, the judgment debt of the insured becomes the judgment debt of the insurer: See *Pacific & Orient Insurance Co Bhd v Kamacheh Karuppen* [2015] 4 MLJ 218; [2015] 4 CLJ 54. *The insurer is bound to settle the judgment sum without the need for another action by the third party claimant, ie, recovery action against the insurer once the conditions in s 96(2) and (3) are fulfilled.*
>
> [103] *Therefore, the question of the respondent having to file for recovery proceedings under s 96(1) against the first appellant as contended by learned counsel does not arise at all: See also the decisions of the Court of Appeal in Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947 and *Yeap Tick In*

which decisions on this point we are in agreement with. In Muniammah Muniandy, this is what Ramly Ali JCA (as he then was) said:

> [21] *Nowhere does s 96(1) of the Road Transport Act 1987 says that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured.* Therefore, the question of the respondent having to file a recovery proceedings s 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. *In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceeding against the insurer.* (Emphasis added.)

[32] Here, in the circumstances that the respondent as the insurer is statutorily liable to satisfy any judgment against the insured, the second defendant in the suit at Sungai Petani Magistrate Court, undoubtedly, the respondent's rights would be directly affected if any judgment is made against the second defendant. In this case, the test laid down in *Pegang Mining*'s case has been satisfied. A flexible approach needs to be adopted to prevent any injustice to the respondent. The respondent has to be given the right to be heard and this too would allow the matter in dispute at the magistrate court to be effectively and completely determined and adjudicated. The main issue in dispute here is whether the second respondent and car number PFH 3246 insured by the respondent were involved in the said accident which the respondent categorically denied the involvement.

[33] We are also of the view that it is immaterial whether the respondent's liability under s 96(1) is contingent on a judgment made against the insured. What is important is that there is an issue between the plaintiff and the respondent as the insurer of the second defendant which is connected with the relief or remedy as discussed earlier. O 15 r 6(2)(b)(ii) clearly envisaged this position. Thus, we agree with the stand taken on this issue by the High Court in *Kimile ak Dangea v MSIG Insurance (M) Bhd* [2013] 7 MLJ 576 and *Govinaraju a/l Nagarajan v Pacific & Orient Insurance Co Bhd* [2014] 8 MLJ 839; [2014] 1 CLJ 1076.

[34] On the same issue, the Court of Appeal of Hong Kong in the case of *Chu Yuen Wah v Lee Kwok Kee & Anor* [1995] 3 HKC 629 held as follows:

> (3) *Jurisdiction under Order 15 was wide enough to permit the joinder of a party whose liability to pay was contingent not only upon the outcome of the proceedings. The whole basis of the rule was to enable a person not a party to protect his rights when necessary so that natural justice could be done to him.* There was nothing unjust or contrary to principle in permitting a party to raise alternative defences in the same case. (Emphasis added.)

[35] The position is similar in the United Kingdom where Lord Diplock in the case of *Gurtner v Circuit* [1968] 1 All ER 328 said this:

> Clearly the rules of natural justice require that *a person who is to be bound by a judgment* in an action brought against another party and directly liable to the plaintiff on the judgment *should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.*

[36] Likewise in the present case, the application to intervene must be allowed to enable the respondent to protect their rights so that natural justice could be done to the respondent. After all, a negligent driver, if proven, is only a nominal defendant but the party injuriously affected by the judgment is the insurer. Ong CJ in the Federal Court case of *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220b mentioned this:

> Compulsory insurance against third party risks has made alterations in the common law whereby insurers are made directly liable to satisfy judgments against the insured. *The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and whose interest should be defended.* (Emphasis added.)

[37] In the circumstances, we are of the considered view that the respondent has the locus to intervene in the trial that involved its insured and the fact that the respondent is statutorily liable to satisfy any judgment made against the insured.

[38] Further, we find nothing under s 96 of the RTA that prevents or bars an insurance company from intervening in a trial involving its insured. This includes s 96(3) which allows an insurance company to seek a declaration that the insurance policy is void and unenforceable. For ease of reference, s 96(3) states as follows:

> (3) *No sum shall be payable by an insurer under subsection (1) if, before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable*:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

[39] Although an insurer may obtain a declaration from the High Court under s 96(3) that the insurance policy is void and unenforceable on the ground, inter alia, that the insured was not involved in the accident, this does

not mean that the insurer is absolved from liability under s 96(1) in the event the trial judge decides on liability against the insured. This makes more reason for the insurer to intervene at the trial stage to protect its interest.

[40] In the Federal Court case of *Mohamad Zulkarnain bin Mustafa v Allianz General Insurance Company (M) Bhd & Ors* [2020] MLJU 1692 reported in *AmGeneral Insurance Bhd*'s case, the court set aside the declaration under s 96(3) by the High Court when the sessions court eventually decided the liability against the insured. In that case, before the liability was determined by Teluk Intan Sessions Court, a declaration under s 96(3) was granted by the High Court on the ground that the insured was not involved in the accident. However, the sessions court, after hearing evidence in a full trial, found that the insured was involved in the accident and entered judgment against him. It was held by the Federal Court that the proceedings at the sessions court had bearing on the originating summons proceedings for the declaration in the High Court. This was explained as follows:

> [154] It is clear that Parliament's intention vide Schedule 9 of the FSA is to provide a check and balance as a way to supervise the insurance companies, to prevent them from easily repudiating liability without reasonable cause.
>
> [155] *Learned counsel for all three respondents pressed home the point that the proceedings in the Teluk Intan Sessions Court were separate and distinct from the proceedings in the High Court pursuant to s 96(3) of the RTA and as such the Teluk Intan Sessions Court proceedings had no bearing on the outcome of the originating summons proceedings in the High Court.*
>
> [156] *We find no merit in the argument. Although the proceedings in the two courts were separate and distinct, the decision of the High Court in the s 96(3) application, which stole a march from the Teluk Intan Sessions Court trial, had a direct and adverse effect on the appellant's future recovery of damages that he obtained from the Teluk Intan Sessions Court, where he came out victorious after a full hearing.* (Emphasis added.)

[41] The Federal Court in *Mohamad Zulkarnain*'s case further explained that the question of whether the insured was involved in the accident was an issue of tort which needed to be determined by viva voca evidence in a single trial, not by two different or separate proceedings. In paras 159 and 160 of the grounds of judgment, this was said:

> [159] *We agree with learned counsel for the appellant that the High Court ought to have dismissed the s 96(3) application as the first respondent relied on facts which formed the core points of dispute between the parties in the trial court, such as whether the rider of the motorcycle was involved in the accident. The question of whether the rider was involved in the accident was an issue of tort and not of contract.* The legislative intent behind s 96(3) is clear, that the provision is only meant for determining issues of voidness and unenforceability of an insurance contract and cannot be exploited to determine core factual issues in the tort of negligence such as the issues of liability and damages.

[160] *The facts and the evidence in the present case were so highly contested,* compounded as it were by the fact that the third respondent made a complete about turn in his evidence after the IO had given evidence at the trial in the Teluk Intan Sessions Court. *Surely this required determination by viva voce evidence in a single trial and not by two different courts as had happened in this case. These highly contested factual issues cannot suitably be resolved by way of a s 96(3) declaration as they form a crucial point of contention between the parties.* (Emphasis added.)

[42] The court then held as follows:

[166] *The granting of the declaration under s 96(3) of the RTA by the High Court was a serious error of law and fact*. It denied the appellant of the fruits of his litigation in the Teluk Intan Sessions Court. This has unfairly left him without adequate remedy and the point must again be emphasised that given the serious doubts in the third respondent's evidence concerning his involvement in the accident, *the correct approach would have been for the High Court to dismiss the s 96(3) application and to allow the trial court to decide on the matter,* which was the approach correctly taken by Lim Chong Fong J in *Malaysia Motor Insurance Pool v Eastern Moon Enterprise & Anor* [2018] MLJU 779; [2019] 10 CLJ 230. (Emphasis added.)

[43] In addition, the Federal Court in the same case explained that the evidence of non-involvement in the accident which relates to the tort of negligence must be adduced at the trial to avoid duplicity of proceedings. This was said:

[172] For all the reasons aforesaid, leave question 1 is answered in the affirmative. Leave question 2 is also answered in the affirmative to prevent two courts of competent jurisdiction from making conflicting findings of fact on the same issue. *Evidence of the alleged non-involvement of the third respondent in the accident must be adduced at the trial to prevent duplicity of proceedings*. As for leave question 3, the answer must likewise be in the affirmative as *a s 96(3) application is only for determining issues of voidness and unenforceability of an insurance contract and not to determine core issues in the tort of negligence.* (Emphasis added.)

[44] In the present case, as alluded to earlier, the requirements under O 15 r 6 of the Rules of Courts 2012 and the test to succeed in the application to intervene has been fulfilled. Further, allowing the respondent to intervene would avoid duplicity of proceedings.

[45] The recent Federal Court decision in *AmGeneral Insurance Bhd's* case, alluded to earlier, clearly indicates that the insurance company need to be involved in the trial that determined the liability of its insured to protect its interest. It would be too late and risky for the insurance company if they rely on s 96(3) to obtain a declaration that the insurance policy is void and unenforceable especially on the basis that their insured was not involved in the accident as in the present case. Furthermore, the Federal Court decided that the issue of negligence or involvement in an accident should be determined in a

trial by viva voce evidence and in a single trial. Thus, the case of *Pacific & Orient Insurance Co Bhd v Arnanda a/l Soria Demadu*'s case and *Badruzamani bin Azmi*'s case relied upon by the appellant on the related issue is no longer good law.

[46] We also noted that the respondent has explained the delay in filing the application to intervene as they need time to conduct the investigation into this case to ascertain whether the insured was involved in the accident. In para 9 of the affidavit in reply by the respondent, this was stated:

> 9. Merujuk kepada Perenggan 6.5 Affidavit Jawapan Plaintif, saya menegaskan bahawa *pihak pemohon memerlukan masa untuk menjalankan siasatan untuk mengesahkan bahawa kesahihan kes ini dan saya juga dinasihati oleh peguamcara pihak Pemohon bahawa permohonan untuk mencelah boleh difailkan pada mana-mana peringkat dalam suatu prosiding*. (Emphasis added.)

[47] For completeness, we need to emphasise here, in an application under O 15 r 6, the issue that the plaintiff or the appellant in the present case does not wish to make the respondent one of the defendants does not arise. O 15 r 6 gives the court wide discretion to allow the application to intervene in ensuring that the dispute would be completely determined and adjudicated. This has been explained by the Supreme Court in *Chan Yee v Chan Yoke Fong* [1990] 3 MLJ 297 in the following words:

> The main object of the rule is to prevent multiplicity of proceedings. Under the rule *the court has a very wide discretion to make the order that he made so that all matters in dispute could be effectually and completely determined and adjudicated upon.* (Emphasis added.)

CONCLUSION

[48] Based on the aforesaid reasons, we are of the view that there is no appealable error by the High Court in its decision to allow the respondent to intervene in the trial at Sungai Petani magistrate court. As such, the appellant's appeal is dismissed with costs of RM10,000 subject to payment of allocatur and the decision of the High Court is affirmed.

Appeal dismissed; and High Court's decision affirmed.

Reported by Ashok Kumar